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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1957

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## No. 855

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HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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Petitioner prays that this Court grant rehearing of its Order of April 28, 1958, denying the Petition for a Writ of Certiorari, 26 L.W. 3309, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the Petition filed March 13, 1958.

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. To preserve a brief exposition, and because it was felt that the reasons adduced were sufficient, Petitioner in the original Petition for a Writ of Certiorari did not discuss the peculiar problems presented by the fact that review is here sought on a case that originated as a habeas corpus attack on a state court conviction. The first part of this Petition will be directed to considerations that become material in light of this factor.

Congress has authorized the Federal courts to grant writs of habeas corpus under certain circumstances when a prisoner is detained by a state in violation of his federal constitutional rights, 28 U.S.C. Sec. 2241 (c)(3)(1952). This statute vests authority to grant the writ in the district courts, 28 U.S.C. Sec. 2241 (a)(1952).

The availability and scope of habeas corpus review in various contexts of denial of due process to state prisoners has been a vexing problem in terms of Federal-State relationships. Schaeffer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956); Note: *Federal Habeas Corpus for State Prisoners*, 55 Col. L. Rev. 196 (1956). The flood of frivolous attacks upon state court convictions, the feeling that it is unseemly for a single district judge to review the validity of the state court conviction often approved by the highest court of the state with certiorari denied by this Court, and the occasional interference with the administration of state criminal law are all factors that have led to a history of attempts at limiting federal habeas corpus. Thus, the attorneys general of over forty states joined with the attorney general

of Pennsylvania in urging that a district court habeas corpus action which sought to overturn a state court conviction was unconstitutional as violative of the Eleventh and Seventh amendments, *U.S. ex rel Elliot v. Hendricks* 213 F. 2d 992 (3rd Cir.); *Cert. Den.* 348 U.S. 851 (1954). Prior to this expression by the chief prosecuting officers of the executive arms of the state governments, the Conference of Chief Justices in 1952 adopted a resolution which stated that "Orderly Federal procedure under our dual system of government should require that a final judgment of a state's highest court be subject to review and reversal only by the Supreme Court of the United States." *The Conference of Chief Justices Resolution on Habeas Corpus* (Counsel of State Governments 1952). The culmination of these governmental attacks on federal habeas corpus was the abortive attempt at limiting legislation in the United States Congress, H.R. 5649 (84th Cong. 1st Sess. 1955) which passed the House but died in the Senate. The House has again, since the original Petition in this matter was submitted, passed a statute closely patterned after the previous H.R. 5649, H.R. 8361 (85th Cong. 2nd Sess. 1958). This Bill has not been acted upon by the United States Senate. This case, therefore, affords this Court an opportunity to clarify and express the current state of the law of federal habeas corpus at a time when such a pronouncement would be of inestimable aid to the Congress in formulating or deciding to by-pass a new law aimed at partially limiting federal habeas corpus jurisdiction.

The Committee report accompanying H.R. 8361 and the hearings before the Committee on the Judiciary on H.R. 5649 emphasize the negative aspects of federal habeas corpus relief which were summarized in the prior para-

graph H. Rep. No. 1293 (85th Cong. 2d Sess. 1958); Hearings on H.R. 5649 (85th Cong. 2d Sess. 1955). The problem is one of continuing and increasing importance in the delicate relationships of the federal system which are now being carefully re-examined. Amidst the numerous expressions of the need for limiting the scope of habeas corpus review the eloquent language of Judge Schaeffer urging the opposite point of view merits repetition.[1] It is respectfully urged that this Court should decide this case, correct the wrong done and in so doing clarify for mature legislative consideration the position in the federal courts of the great writ.

2. Habeas corpus reversal for different kinds of violations of federal constitutional rights have occurred in the past. However, it should be noted that the use of habeas corpus to test state convictions in terms of misjoinder in indictments and prevention of a fair trial by adverse publicity has not been subject to considered examination by this Court. The important issue of how far the writ extends, whether it encompasses these and other kinds of constitutional violations, could appropriately be decided upon the facts of the instant case.

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[1] "The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than that any innocent one be punished. To the extent that the small number of meritorious petitions shows that the standards of due process are being honored in criminal trials, we should be gratified; but the continuing availability of the federal remedy is in large part responsible for the result. What is involved, however, is not just the enforcement of defined standards. It is also the creative process of writing specific content into the highest of our ideals. So viewed, the burdensome test of sifting the meritorious from the worthless appears less futile, and there is less room for the emotions of federalism." Schaeffer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 25 (1956).

3. The United States Court of Appeals for the Fifth Circuit did not consider these problems in its opinion, but directed its attention solely to the constitutional questions (App. "A" of original petition). Although Petitioner thus had the issues decided in his favor sub silentio, nevertheless these matters are urged as a basis for asserting that this is an important case in which this Court should grant Certiorari since it involves in all its aspects, and at a time when the issue has a significance it perhaps has never had before, the entire area of federal habeas corpus as applied to state court convictions.

4. Apart from the problems presented by the habeas corpus nature of this case are the substantive legal questions presented by the egregiously faulty charging document which commenced this criminal prosecution. This Court has inadvertently overlooked the potential harm that could be caused by the language used by the Fifth Circuit in deciding the cause.[2] This language, which establishes the law of the federal courts for those states within the competence of the Fifth Circuit, will be understood as establishing a rule of law that a state may misjoin defendants or offenses (even within the same count) without any allegation of connection between them, and that the prima facie error that may inhere in this misjoinder can be cured by reference to testimony outside the charging document itself. The burden of proof is shifted so that

[2] "It may be conceded, as the appellee so strenuously argues, that from the face of the information alone it would appear that distinct and separate offenses, committed in several counties, were charged against different persons, and that the information itself shows no connection between the several offenses nor between the various co-defendants. • • • The state's evidence upon the trial of the defendant and his co-defendants for the several substantive offenses clearly went to prove that there was but one vast lottery operation, covering several counties, operated, backed and banked by the appellee." 250 F. 2d at 647; original Petition, App. "A", p. 3-4.

the defendant must prove that he was actively prejudiced by the misjoinder and the state need do nothing. This burden, an extremely onerous one in practical terms, can virtually never be met and the net effect of these circumstances is to demolish, at least in the Fifth Circuit States so far as federal review is concerned, the rule that multiple defendants should not be misjoined.

This Court, it is respectfully urged, should reconsider its decision and correct the erroneous application of the law put forth by the Fifth Circuit. In so doing the Court will be following the philosophy of the *Kotteakos* case (*Kotteakos v. U.S.* 328 U.S. 750 (1946)), a philosophy with which the language of the Fifth Circuit in the instant matter is in conflict.

## CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CLAUDE PEPPER
WALTER A. APFELBAUM

PAT WHITAKER
TOM WHITAKER
MARK R. HAWES
Counsel for Petitioner

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

_____

Counsel for Petitioner

## PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing of Order Denying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this _____ day of _____, 1958, to Richard W. Erwin, Attorney-General of the State of Florida, Attorney for Respondent, at his offices in Tallahassee, Florida.

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Claude Pepper